



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
FREEDOM OF INFORMATION ACT BRANCH
Washington, D.C. 20570

Via email

July 29, 2022

Re: FOIA Request No. NLRB-2022-001365

Dear Kaitlin Kaseta (Regional Hospital of Scranton):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on June 16, 2022, in which you seek the following:

- (1) Any and all documents received by or maintained by Region Four in connection with Case No. 04-CB-286783, which is a case that has been closed by Region Four and the National Labor Relations Board, including but not limited to statements of position and / or affidavits received from any party; legal memorandum prepared by Region Four or other officials of the National Labor Relations Board in connection with the case; and any other documents received or exchanged related to the case.
- (2) Any and all correspondence regarding Case No. 04-CB-286783 received by or sent by any agent of Region Four, including but not limited to: any and all communications from the Charged Party, SEIU Healthcare Pennsylvania, or its agents or employees; any and all communications between agents or employees of Region Four; and any and all communications from any other agents or employees of the National Labor Relations Board.

You assumed financial responsibility for the processing of your request in the amount of \$500.00.

We acknowledged your request on June 16, 2022. We have interpreted your request to be seeking all records from the case file of *SEIU Healthcare Pennsylvania (Scranton Hospital Company, LLC d/b/a Regional Hospital of Scranton)*, Case No. 04-CB-286783 and have processed it accordingly.

Your request is granted in part and denied in part, as explained below.

A search of the Agency's electronic casehandling system, NxGen, has been conducted. This search has yielded 87 pages of responsive, releasable records from the requested case file, which are attached. Our search did not locate any affidavits in the file.

After a review of the attached records, I have determined that portions are exempt from disclosure under Exemptions 6 and 7(C) of the FOIA (5 U.S.C. § 552(b)(6) and (b)(7)(C)). Specifically, redactions have been made to protect the privacy interests of individuals named in the records. These redactions were made pursuant to FOIA Exemption 6, which pertains to information the release of which would constitute a clearly unwarranted invasion of personal privacy, and FOIA Exemption 7(C), which pertains to records or information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6), (b)(7)(C).

Your request is denied to the extent that 16 pages of responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemption 5 (5 U.S.C. § 552(b)(5)). Specifically, these records include an internal memorandum containing recommendations in the case, internal communications between the Board agent, Regional decisionmakers and/or Office of Appeals staff, and an internal investigative report prepared by the Region discussing the processing and disposition of the charge.

Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency,” and covers records that would “normally be privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep’t. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, “it must form a part of the agency’s deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not “identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this

process.” *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, see, e.g., *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff’d*, 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep’t of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982)).

The attorney work-product privilege protects records and other memoranda that reveal an attorney’s mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep’t of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney’s opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.*

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and her Regional staff concerning strategies in the processing of this unfair labor practice case. Since they contain proposed legal strategy in the case, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from disclosure. *Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and/or opinions of the General Counsel’s staff and was created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety.

For the purpose of assessing fees, we have placed you in Category A, commercial use requester. This category refers to requests “from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.” NLRB Rules and Regulations, 29 C.F.R. §

102.117(d)(1)(v). Consistent with this fee category, you “will be assessed charges to recover the full direct costs of searching for, reviewing for release, and duplicating the records sought.” 29 C.F.R. § 102.117(d)(2)(ii)(A). Charges are \$9.25 per quarter-hour of professional time. 29 C.F.R. § 102.117(d)(2)(i).

Two hours and fifteen minutes of professional time were expended in reviewing for release the requested material. Accordingly, please remit \$83.25.

Payment Instructions: Due to the COVID-19 pandemic and resulting widespread employee telework at the Agency’s Headquarters offices, we are no longer accepting checks or money orders as payment at this time. To submit payment for your FOIA request, please use www.pay.gov. From the www.pay.gov home page, scroll down to the bottom left corner to select “Pay a FOIA Request.” Click “See all options” and go to “Filter By Agency” to check the box for the National Labor Relations Board. Continue following instructions on the website. Please remember to include the Invoice Number, which is the NLRB FOIA Case No., and the amount you intend to pay. Further, please be advised that all FOIA payments must be paid in full before any future FOIA requests are processed.

You may contact Jodilyn Breirather, the FOIA Specialist who processed your request, at (202) 368-1927 or by email at Jodilyn.Breirather@nrlb.gov, as well as the Agency’s FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency’s FOIA Public Liaison is:

Kristine M. Minami
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nrlb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

July 29, 2022

Page 5

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov
Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt
Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nrlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ Synta E. Keeling

Synta E. Keeling
FOIA Officer

Attachment: (87 pages)